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No. 191.

Brief of Pillans & Bestor for D. C.

Filed Mar. 11, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

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JETTA SIMON, Plaintiff in Error,

vs.

JOHN N. CRAFT, Defendant in Error.

BRIEF OF H. PILLANS AND D. P. BESTOR,

FOR DEFENDANT IN ERROR.

(17,621.)

2211

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FOR DEFENDANT IN ERROR.

This was an action of ejectment brought by Jetta Simon against John N. Craft in the Circuit Court of Mobile to recover a lot of land in the city of Mobile, Alabama. The cause was tried on an agreed statement of facts.

Jetta Simon entered into possession of this real estate on May 23d, 1872, under deed, and continued in exclusive and adverse possession until May 6th, 1889.

Henry Simon obtained title to the lot under a deed executed to him by Ralph G. Richard, as the Guardian of Jetta Simon, a lunatic, which deed was executed on May 11th, 1889.

John N. Craft entered into such possession under a

purchase from and deed executed to him on May 17th, 1889, by Henry Simon and wife, for the cousideration of four thousand dollars, and has been in possession since said date.

The record shows a full and complete copy of all the proceedings in the Probate Court of Mobile County; wherein Jetta Simon was declared *non compos mentis*, and Ralph G. Richard was appointed her guardian, and as such was, on proceedings duly taken, authorized to sell such property and make such conveyance to Henry Simon, the purchaser, from whom Craft purchased the property.

The proceedings in lunacy, were commenced by a petition filed in the Probate Court of Mobile County, the court having jurisdiction, by Ralph G. Richard to have Jetta Simon declared *non compos mentis*. Record, p. 19.

The statutory order was made by the court to the sheriff to bring Mrs. Simon into court at the trial of said question as to her lunacy. Record, p. 20.

A jury was empaneled, and a trial was had, and the jury rendered a verdict as follows: "We the jury find Mrs. Jetta Simon to be of unsound mind." Record, p. 19.

The order of the court was then made on said verdict and in accordance therewith. Record, p. 23.

Afterwards Ralph G. Richard applied for letters of Guardianship and was appointed Guardian "over the estate of said Jetta Simon on the execution of a bond of $7,000." Record, p. 24.

Ralph G. Richards afterward applied to the court for an order to sell the property, a guardian *ad litem* was appointed and trial had on evidence, and the order was granted, and the property was duly and regularly sold

at public auction by said guardian, and Henry Simon became the purchaser, and paid the purchase money. Craft afterwards bought from Simon. Record, pp. 26, 35, 38, 39.

There was no attack made in the court below or in the Supreme Court of Alabama on the regularity of the petition for sale and the sale made by the guardian, and we do not suppose any attack on the same will be attempted in this court. The whole attack was made on the regularity or irregularity of the proceedings in the adjudication of Mrs. Simon to be a lunatic, and the consequent appointment of a guardian over her person and property.

This cause was first tried in the Circuit Court of Mobile County on the agreed statement of facts and a verdict was rendered for the plaintiff. It was then appealed to the Supreme Court of Alabama, and this judgment was reversed with a dissenting opinion and the cause remanded.

See Craft vs. Simon, 118 Alabama, 625.

On the second trial in the Circuit Court judgment was rendered for the defendant. The cause was then again appealed to the Supreme Court of Alabama, and was affirmed by the whole court, but no opinion at length was delivered. It was merely affirmed on the authority of Craft vs. Simon. 118 Alabama, 625.

By a writ of error, the cause was brought to this court.

This cause then has been before the State courts of Alabama four times. It will be noticed, that the whole case turns on the construction of the Statutes of Alabama as to lunatics and the requirements and practice under said statutes as to lunatics.

FIRST.

Is there any federal question in this cause which this court will take jurisdiction of and adjudicate?

Article 14 Section 1 of the Amendments to the Constitution of the United States reads as follows: "Nor shall any State deprive any person of life, liberty or property without due process of law."

Is this clause at all applicable to this case as presented?

This court has said: "When the parties have been fully heard in the regular course of judicial proceedings an erroneous decision of the State court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States."

Central Land Co. vs. Laidly, 159 U. S., 12,

And again, "We have repeatedly held that the construction of a State statute belongs to the State courts, and is not a federal question which we can review on a writ of error to a State court."

Ins. Co. vs. The Treasurer, 11 Wall, 208.

Again: "The decision of a State court as to what should be deemed a fraudulent conveyance, does not present any federal question."

McKenna vs. Simpson, 129 U. S., 511, 512.

Again: "A State cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the constitution is met *if the trial is had according to the settled course of judicial proceedings.*"

"Due process of law is process due according to the

law of the land. This process in the States is regulated by the law of the State."

"Here the State court has decided that the proceeding below was in accordance with the law of the State, and we do not find that to be contrary to the constitution or any law of the United States."

Walker vs. Sauvinet, 92 U. S.. 92.

See also

Murray's Lessee, vs. Hoboken L. & Imp. Co., 18 How., 280.

Head vs. Amoskeag Co., 113 U. S., 26.

Moreley vs. Lake Shore R. R., 146 U. S., 171.

Hartford Fire and Ins. Co. vs. Chicago, Milwaukee and St. Paul R'wy Co., 175 U. S., 91.

"The court below having had jurisdiction of the offence and of the accused, and having proceeded under a statute not repugnant to the constitution of the United States, the Circuit Court of the United States had no right to interfere."

Bergieman vs. Backer, 157 U. S., 655.

See also

Dougherty vs. Nevada Bank, 160 U. S., 171.

Bacon vs. State of Texas, 163 U. S., 207.

Wood vs. Brady, 50 U. S., 18.

14 Wallace, 9, 10, 22, 661.

Marqueze vs. Bloom, 16 Wallace, 351.

"The elementary rule is, that this court accepts the interpretation of a statute of a state affixed to it by the court of last resort."

Tullis vs. Lake Erie and Western R. R., 175 U. S., 353.

Missouri and Kansas R. W. Co. vs. McCann, 174 U. S., 580, 586.

As this cause of Simon vs. Craft embraces the construction of state statutes, and the proper proceedings thereunder, we contend that due process of law has already been administered, and that this court will not review the proceedings of the state court, and we respectfully ask that this cause may be dismissed.

SECOND.

OF DUE PROCESS OF LAW.

There is no question before this court except the one, whether plaintiff in error has been deprived of her property by due process of law; as there is no other federal question claimed to be in the case.

The attempt of the plaintiff in error doubtless will be here as it was below, to show that the proceedings which resulted in the sale of her lands by her guardian in lunacy, under which sale defendant holds, are void, as wanting in "due process of law."

We submit that such is not the case. *First*, because the lunacy proceedings inveighed against and complained of as invalid, were such as were usual and customary and whose validity was familiarly recognized in the ancient practice and long prior to the adoption of the fourteenth amendment; being and always having been, well recognized administrative proceedings to fix the status of a subject or citizen in the exercise of the parental power of the crown and state, in behalf of a class of unfortunates, and being a prerogative proceeding, *sui generis*, savoring perhaps of a proceeding *in rem*, but in no sense of proceedings *inter partes;* of a sort that belongs and has always belonged to the class of prerogative, state, pro-

ceedings known as inquisitions of office, which if duly taken by the sovereign, cannot be collaterally inquired into. *Second*, because the proceedings in lunacy were not taken without adequate notice to the lunatic, even if notice were requisite.

It has never been controverted in this case, that if the lunacy proceedings are valid, the subsequent sale by the guardian in lunacy are likewise valid.

I.

Due process of law as found in the constitution, signifies the law of the land, to use the language of Magna Carta. The constitution makes no attempt to define what proceedings constitute due process, but assumes that custom and law has already settled what it is.

Murray's Less. vs. Hoboken, 18 How., 275, 280.
Walker vs. Sauvinet, 92 U. S., 90.
Maxwell vs. Daw, 176 U. S., 581-595.
Reagh vs. Spann, 3 Stew., 1-8.

In Lowe vs. Kansas, 163 U. S., 81-85, this court said:

"Whether the mode of proceeding prescribed by this statute and followed in this case was due process of law, depends upon the question whether it was in substantial accord with the law and usage in England before the declaration of independence and in this country since it became a nation in similar cases." See also:

Ex parte Wall, 107 U. S., 265.
Davidson vs. New Orleans, 96 U. S., 97.
Holman vs. Manning, 65 N. H., 228.
King vs. Mullens, 171 U. S., 404, 430, 431.
Weimer vs. Bunbury, 30 Mich., 201.

From the opinion in this Michigan case, pronounced by Mr. Justice Cooley, we quote:

"There is nothing in these words ('without due process of law') however, that necessarily implies that due process of law must be judicial process; much of the pro-

cess by means of which the government is carried on, and the order of society maintained is purely executive or administrative. * * * Estrays were at common law taken up and disposed of without judicial proceedings. * * * Proceedings for the levy and collection of the public revenue afford still better illustration. Almost universally these are conducted without judicial forms. * * * And any hearing allowed to parties in their progress has not been in the nature of a trial, but as a means of enlightening the revenue officers upon the facts which should govern their action. This has been so from time immemorial, and it has never been supposed that the tax payer had a constitutional right to resist the tax because he had never had any judgment against him on a judicial hearing to fix its amount. * * There is nothing technical, or we think obscure, in the requirement that process which divests property shall be due process of law. The constitution makes no attempt to define such process, but assumes that custom and law have already settled what it is. Even in judicial proceedings we do not ascertain from the constitution what is lawful process, but we test their action by principles which were before the constitution, and the benefit of which we assume that the constitution was intended to perpetuate. If there existed before that instrument was adopted, well known administrative proceedings which, having their origin in a legislative conviction of their necessity, had been sanctioned by long and general acceptance, we are no more at liberty to infer an intent in the people to prohibit them by implication from ny general language than we should be to infer an intent to abridge the judicial authority by the use of similar words. *The truth is, the bills of rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation.* They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are sufficient for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation.

"We are, therefore, of necessity driven to an examination of the previous condition of things. * * *Nothing previously in use, regarded as necessary in government and sanctioned by usage, can be looked upon as condemned by it.* Administrative process of the customary sort is as much due process of law as judicial process."

As was said in Murray's Lessees vs. Hoboken, 18 Howard, 280, "Though due process of law generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceedings, *yet this is not universally true.*"

II.

The proceeding of inquisition of lunacy is a special and peculiar proceeding belonging to the class of inquests of office, and it does not remotely resemble an action *inter partes.*

The care of insane persons in England was vested in the king as *parens patriae*, and was exercised by him under his prerogative by his chancellor.

Pope on Lunacy (4th Ed. London, 1900), 22, 25, 47.
13 Ency. Brit. 113, Tit. Insanity.
Shelf. Lun., Chap. IV.

It comes near to, if not founded on the police power, which is not impaired by the clause unde consideration.

Barbier vs. Connally, 112 U. S., 27-31.

The existence in the American state, of the King's prerogative powers as *parens patriae* cannot be denied.

Mormon Church case, 136 U. S., 1, 58.

As stated in Ex parte Crammer, 12 Ves. Jr., 441, "The whole prerogative is this; that it falls to the King to take care of those who cannot take care of themselves." The expression used by the learned chancellor in this case, that the lunatic must be present, "which is his privilege," is a mere direction by the chancellor under the circumstances of that case and while ordering a commission of lunacy, and cannot be taken to be a ruling that such notice is an essential prerequisite to the validity of the

inquisition; for so interpreted, it would have no support in the other and elder cases.

Shelford Lun., Chap. IV, *passim*, and particularly Sec. 4 and Marg., pp. 86, 100, 101.

These inquests of office are *sui generis* and *ex parte*, though the courts might permit or order notice in their discretion.

Pope on Lun., (4th Ed.) 47, 59, *note d.*
Shelford Lun. Marg., p. 101 and Chapter IV generally and forms.
King vs. Daily, 1 Ves. Sr., 269 cited therein.
Re Wendell, 1 Johns. Ch. 600.
Medlock vs. Cogburn, 1 Rich. Eq. 477.

Being so they cannot be impeached on collateral attack for want of notice.

Dutcher vs. Hill, 29 Mo., 291.
citing Willis vs. Willis, 12 Penn. St., 179.
Bethea vs. McLennon. 1 Ired. L., 523.
In re Cook, 6 N. Y., Supp., 720.
Nailor vs. Nailor, 4 Dana, 340.
Kimball vs. Fish, 39 N. H., 210.
Rogers vs. Walker, 6 Penn. St., 371. (opinion by Gibson, C. J.)
Hutts vs. Hutts, 62 Ind., 214.

They were in England held by the King's officers; escheator, sheriff or commissioner, under commission issued out of chancery, concerning any matter that entitled the King to lands, goods or chattels.

1 Black. Com., 305.
2 Black. Com., 258.
Shelf. Lun., marg. p. 74.
Ex parte Barnesly. 3 Atk., 171.
16 Ency. of Law, 2nd Ed., 565-6.
Pope Lun., (4th Ed.), 22, 23.

They were, therefore, *ex parte*, and notice was not essential, but discretionary. "Under the old practice it

was unnecessary to serve the lunatic in any case with notice of the execution of the commission. * * * In many cases, what Lord Hardwicke called 'the laying hold of his lands,' was the first notice received by the alleged lunatic."

Pope on Lun., (4th Ed., London, 1892) 59, *note d.*

"The law has provided that no person shall be put in such a position, deprived of his liberty and the administration of his affairs, until the fact is ascertained by a proceeding that I must admit to be *ex parte*".

Ex parte Ward, 6 Ves. 579.
Ex parte Hall, 7. Ves. 261.

This inquisition is not in any wise a suit *inter partes*, and personal notice is not essential, it being only a mode by which the public discharges its duty to a citizen.

Chavennes vs. Priestly, 80 Iowa, 316.

Hence the petitioner moving the inquisition, is not deemed a real party in interest and cannot appeal save as to costs adjudged against him.

Studebaker vs. Markley, 7 Ind., App. 368.

"Such inquests are of a public nature and taken under competent authority, to ascertain a matter of public interest, they are admissible against all the world. They are very analogous to proceedings *in rem.* being made on behalf of the public; no one is properly a stranger to them; and all who can be affected by them usually have the power of contesting them."

1 Stark. Ev. marg., p. 307.

That office found is a public transaction carrying notice to the world seems recognized in this court.

Bennett vs. Hunter, 9 Wall, 326.
King vs. Mullins, 171 U. S., 404.

"An inquest of lunacy may be considered to be in the nature of a proceeding *in rem.*"

Hart vs. Dramer, 6 Wend., 497.

Which proceedings are above collateral assault.

Grignon vs. Astor, 2 How., 319.

Such then was the ancient and customary practice on the inquisition of lunacy. Lunacy being found under commission and duly returned, the appropriate court appointed a committee, now in Alabama styled a guardian.

The legislation in Alabama has followed the ancient traditions; the first acts being those of 1803 and 1806 of the legislature of the Mississippi territory from which Alabama sprang, which statutes are found in Turner's Laws and by which the orphan's court was "authorized and empowered in their county, on request of friends or relations of any idiot, lunatic or person *non compos mentis*, to direct the sheriff to summon twelve jurors to make inquisition thereto, on oath, and if such person shall be adjudged by such inquisition to be incapable of taking care of him or herself, and when they, or a majority of them, shall so certify to the orphan's court, said court shall assign some suitable person to be guardian."

Turner's Laws, Mississippi Territory, 446, Sec. 32.

Lunatic's lands might be sold under same power and restrictions, as by executors and administrators. (Sec 33.)

This remained unchanged, (see Toulmin's and Aikin's Digest and Meek's Supplement, Ala. Statutes) until the adoption of the Acts of 1819 and 1821, found in Clay's Digest at page 302, sections 29, 30; by which the provision is: That it shall be lawful for the orphan's court when any lunatic is within its jurisdiction, to appoint a guardian for such lunatic during pleasure, "such lunacy to be ascertained by the inquisition of a jury, by virtue of a writ to be issued by the court to the sheriff of the county for that purpose," (sec. 29); and inquisitions might be ordered in vacation or in open court and made returnable as process of citation. On sufficient cause shown the judge might order that such inquisition be had before him; in other respects such inquisition should be had as theretofore. (Sec. 30.)

Next, came in the present statute, with the Code of 1852, which, with no material alteration, save from probate *judge* to probate *court*, is embodied in the Code of 1886. This, in section 2390, Code of 1886, makes it the duty of the probate court to appoint guardians for persons of unsound mind, residing in the county, etc., under the limitations and in the mode thereinafter prescribed; section 2391 of the last-named Code declares that a guardian must not be appointed for a person alleged to be of unsound mind until an inquisition has been had and taken as directed.

Section 2393 prescribes the duty of the court on receipt of the sworn petition of any relative or friend of the person, setting forth the "facts," *and* the name, age, sex and residence of such person; which is in such case, to appoint a day for the hearing thereof.

Section 2393 prescribes the method of procuring a jury, which, however, is superseded so far as Mobile county is concerned, by the local jury law; and provides for subpœnas for witnesses, and a writ to the sheriff to take the person alleged to be of unsound mind and if consistent with his health and safety, have him present at the place of trial.

Section 2394 provides for an inquisition into the facts alleged in the petition and verdict thereon.

Section 2395 provides, that if the jury find the facts alleged to be true, and that such person is of unsound mind, the court shall record the petition and proceedings and appoint a guardian.

So it will be seen that from the beginning, the thing inquired into by the jury, in a summary way, is the mental status of the person in respect of whom the proceeding is had. The court must only act when it has jurisdiction

by residence, etc., and on a verified petition filed by a relative or friend; these concurring it is its duty to appoint a guardian for every person of "unsound mind" "who shall be so found on the inquest."

The Alabama law further follows the ancient practice in that it provides for a retrial of the question of lunacy upon application, at any time, of the alleged lunatic, the proceeding being closely analagous to the traverse of the common law; upon issue joined, "the like proceedings must be had, as upon the original inquisition."

Code Ala. 1886, §§2397-2400.

Code Ala. 1896, §§2262-2265.

Compare Shelf. Lun., Of Traversing the Inquisition, marg. p. 113.

An examination of the lunacy statutes of the american states will, we believe, show that they almost universally, and, up to a recent period, universally resembled the ancient English procedure, in making no provision for the service of summons or notice on the alleged lunatic of the pendency of the inquisition. It is inconceivable that all these statutes, patterned as they are upon the old methods, are invalid, as not following "the law of the land."

It is true that while there are American cases of respectability that regard personal notice to the alleged lunatic, as prerequisite to the validity of these proceedings; yet they all, we think, arise from a failure to consider the nature and history of the procedure, or grow out of the expressions contained in the opinion of the Massachusetts court in the case of Chase vs. Hathaway, 14

Mass., 222, which are inconsistent with the nature and history of the proceeding and of the american legislation in line with these traditions.

The case of Chase vs. Hathaway arose, it should be noted, on direct appeal from the tribunal holding the inquisition, and the learned chief justice in the course of his opinion giving his reason for reversing the decree of the probate court, on this direct appeal, declared that he thought it advisable, that, when commission issued, notice should be given to the person proceeded against; and while admitting that the statutes provided for no notice, declared that a notification served and returned in the manner practiced with other processes would be sufficient. In support of his views, he cites a case before the Lord Chancellor of England, wherein the latter "*was inclined*" to but did not quash the inquisition, the commission not having been executed at the place of abode of the lunatic, and the order that he should have notice having been disobeyed. *7 Ves. Jr., 261.* A case which shows that such notice was not, in the english practice, deemed absolutely essential to the validity of the inquest and finding of lunacy.

Per contra where the attack is made collaterally, and the court has to face the question of the validity of the proceeding upon the inquest; the following cases held these to be above attack:

S. Tier Mas. etc., vs. Laudenbach, 5 N. Y., Supp. 901.
Arington vs. Short, 3 Hawk., 71.
Dutcher vs. Hill, 29 Mo., 291 and cases cited.
Chavannes vs. Priestly, 80 Iowa, 316.
Medlock vs. Cogborn, 1 Rich. Eq., 477.
Smith vs. Barnham, 1 Aik., (Vt.) 84.
Kimball vs. Fisk, 39 N. H., 210.
Rogers vs. Walker, 6 Penn. St., 371.

Boswell Jus. § 56

In England and under american authorities the proceeding could go on against a non-resident or absent lunatic.

Pope Lun., (4th Ed.) 70.
Shelford on Lun. and cases cited p.
Ex parte Southcote, 2 Ves. Sr., 401.
Matter of Child, 16 N. J. Eq., 498, and cases cited therein.
Matter of Perkins, 2 John, Chan., 124.
Re Petit, 2 Paige, 174.
Re Gause, 9 Paige, 416.

which could not be, were not the proceeding administrative and *ex parte* or *in rem* in its essence.

III.

If notwithstanding the peculiar character of this lunacy proceeding personal notice to the alleged lunatic is essential to its validity, all that need appear is, that notice actually came to the party; the form is immaterial.

L. & N. R. R. Co. vs. Schmidt, 176 U. S.
Chase vs. Hathaway, 14 Mass., 222.
Fore vs. Fore, 44 Ala., 478.

IV.

If, however, this be treated as a mere proceeding *inter partes*, and if our eyes shall be closed to the history of its origin in prerogative and of its classification among the inquisitions of office necessary in the administration of the functions and duties of the state for the protection of an unfortunate class; yet, here is presented a case, where the proceeding was not had without a substantial notice being required by the statute and the notice actually given.

Upon the filing in the Probate Court of the verified petition for an inquisition into the alleged lunacy of Jetta Simon, on January 30th, 1889, an order was duly entered, appointing the 6th day of February for hearing

the said petition and for the drawing and summoning of a jury as required by law, and a writ was ordered to issue to the sheriff requiring him to take said Jetta Simon "so that he have her in court to be present at the trial thereof, if consistent with the health and safety of her, the said Jetta Simon." This action by the court was in strict accordance with the Alabama statutes as found in the Code. The sheriff returned, that he executed the writ by taking into custody the said Jetta Simon, "and handing her a copy of the said writ," and that as it was inconsistent with her health and safety to have her present at the place of trial, and on the advice of a physician named and whose certificate is attached, "she is not brought before the Honorable Court." The physician's certificate attached is copied on page 21 of the record, the setting of the case, writ and return being found on page 20 thereof. The court itself, on the inquest, found the facts alleged in the sheriff's return regarding her unfitness to be present, to be true. (Rec. p. 23.)

The law of Alabama humanely provides, that in all these cases the alleged lunatic shall be taken and brought to the court, if consistent with her health, and the order of the court followed this, and the precept to the sheriff said the same thing, though in a slightly different way and did not in precise arrangement of its words conform to the statute, but required him to take the alleged lunatic, if consistent with her health, and have her at court. The two expressions mean exactly the same thing. It will be seen that he executed the writ as if it had been in statutory form, and that the writ designated the day of the hearing and the object of the hearing, and came to the hands of the alleged lunatic by service of copy, all on the 31st day of January, 1889, six days be-

fore the trial. This is all that the record shows was done with Mrs. Simon, who is not shown to have been restrained after the sheriff ascertained her condition or unfitness for being taken before the jury. *44 Ala., 481.*

This conveyed to the person proceeded against, the now plaintiff in error, Mrs. Simon, if she was a sane person, the most distinct and unmistakable notice and admonition that her liberty and estate was threatened, so far as the law of lunacy could interfere with these, and she had personal notice therefore, of the proceeding, as full and complete, in fact, as could have resulted from a common writ of summons. Not only is this manifestly the case on the face of the record, but it has been so adjudged by the Supreme Court of Alabama, not in this case alone, but in a case which arose many years anterior to this one; the case of *Fore vs. Fore, 44 Ala., 478*; in which the writ and return ran as in the case at bar; the court holding that this was adequate notice to the person proceeded against.

The command to the sheriff was, not that he take and detain, until discharged by law, the alleged lunatic; but was simply a command to the sheriff to take her and produce her, if in a fit condition to endure the strain; in the language of the writ, to ascertain if she was in fit condition to be brought before the jury, and if she was, to take her and fetch her there, and under this writ and under this statute, no detention save to the extent necessary to the taking her to bring her, if fit, before the jury, is contemplated or permissible. Here we have no mittimus or warrant of commitment of the unfortunate to the sheriff, to be by him detained or restrained until discharged by law, and no return by the sheriff that he has

put her person under any continued restraint, and therefore no justification for the assumption by plaintiff in error, that the record shows that instead of an opportunity having been given to the alleged lunatic to defend herself she was absolutely restrained from appearing and defending. We take it that no such thing is established by the record. What terms could have been used in the statute more clear than these which are used, to indicate that the writ to the sheriff and the execution of that writ was for the purpose of authorizing, merely, the bringing before the court of the afflicted person if fit to be so brought. How, from this statute can be spelled an indefinite commitment of the lunatic to prison? There is no alternative direction to take her and bring her to court and if she be unfit to lock her up, or hold her for further disposition. The simple command is, take her and bring her to court unless this is impracticable from humane considerations, in which case you need not do so. It certainly followed, that if she was on investigation found unfit to be brought he could only release her, the object of his taking her having failed.

See the contention on this return, of Mr. Cumming, in Fore vs. Fore, 44 Ala., 481.

However, assuming to be well founded in the record, plaintiff in error's contention that the respondent was restrained of her liberty and forcibly prevented from appearing in person, a thing not shown, but assumed, this would, we take it, not destroy the validity of the proceedings on this collateral attack. From nothing does it appear that the defendant was prevented from being represented by counsel thereat, from summoning witnesses and from having herself relieved from the restraint, if, as she now contends, it was improper and illegal, by *habeas*

corpus. If every arrest restraining the liberty of one proceeded against in the courts is such a deprivation of the defendant's liberty and free action as forbids his defense there, then has come an end to all proceedings against those charged with crimes not bailable, or if bailable, to answer which they have not entered into bail. So, had Mrs. Simon remained under the care of the sheriff, she was nevertheless entitled to employ counsel and be heard in court and, if needful, to be brought into court for the purpose of being there heard, by appropriate process and to an appeal or *certiorari;* and if the Alabama law was invalid, in so far as it reposed in the discretion of the sheriff the decision whether she should be brought into court or not, then the courts, including the probate court, were open to her, to remove the illegal restraint by writ of *habeas corpus*, and she had an easy remedy for constraining this officer to conduct her into the court, or to release her altogether, so that she could attend.

It is plain he might rightfully be charged with taking her to produce, if practicable, at the inquest. The validty of this, we take it, could not be questioned. It is in line with the old practice. It is plain that she was in receipt of personal process notifying her of the legal proceeding which had been initiated, looking to an inquisition into her sanity. It is plain then, if anything was irregular or invalid or to be complained of, that it was the detention of her by the sheriff, if such detention continued, or the law which authorized such detention, and it cannot be said that by such an illegal detention, if illegal it was, she was deprived of notice of the proceeding or sufficient opportunity to defend. Unless there was entire absence of notice, we take it the jurisdiction of the court cannot be even plausibly contended against.

This court has as already adverted to, taken the same view as the Alabama court, that the mere form of the procedure is not regarded; that it is enough if the interested person had actual notice.

L. & N. R. R. vs. Schmidt, 177 U. S., 236.

The Alabama practice in this matter of waiving production of the lunatic if it appear to be improper to have her produced, is not dissimilar to that of other states, inspired by the same motives of humanity, in which states it was not deemed to invalidate the proceedings.

As the presence of the alleged lunatic has always been deemed desirable, statutes usually require the presence of such person when practicable and have been upheld in the courts. Besides Alabama, for example see

Indiana R. S. 1881, § 2547.
Martin vs. Matsinger, 130 Ind., § 555.
Kentucky, McAfee vs. Commonwealth, 3 B., Mon. Ky., 305.
New York, Re Blewitt, 131 N. Y., 541; Re Wendell, 1 Johns., 600; Re Tracy, 1 Paige, 580.
South, &c., vs. Laudenback, 5 N. Y. Supp. 901.
Missouri, Dutcher vs. Hill, 29 Mo., 271.
New Jersey, *Re* Vanauken, 10 N. J., Eq. 186.
Ontario, Re Newman, 2 Chamb., 390.

V.

If it be contended that, though erroneously, the Alabama Courts have held personal notice to be essential to the validity of these inquisitions, we answer that we abide the Alabama doctrine, which is, that notice by the sheriff taking the alleged lunatic under the writ is sufficient, and none other is needed.

Fore vs. Fore, 44 Ala., 478.
Craft vs. Simon, 118 Ala., 625.
Simon vs. Craft, MS.

And if this court departs from the Alabama court's influence and would determine the case on principle; then it is not bound to assent to any part of the Alabama doctrine as to whether personal, as distinguished from the general and universal notice which is presumed to attend these governmental inquisitions, is essential to the validity of the finding.

By way of special reply to certain matters in the brief filed on behalf of plaintiff in error, and which came to our hands after the above was put in type, we submit the following:

First, we would call attention to an extremely grave error on pp. 42, 43, of the brief, which sets out as the statute law of Alabama governing the case, section 2750 of the Code of *1852*, and omits the equivalent section of the later and controlling Code of *1886*, and upon the language of the section in the former Code, bases the argument, that the probate judge, and not the probate *court*, was designated to call the jury and with it form the statutory tribunal created to inquire into the sanity of the citizen; the brief saying, that this clause of the Code of 1852 remained in this respect unchanged by any act of the legislature up to the time Mrs. Simon's sanity was under inquisition. Now the fact is, that the section quoted from the earlier Code had been *ex industria* changed by the law maker in this very particular, and this duty which had theretofore rested upon the probate judge, was imposed upon the probate court. We reproduce the equivalent section 2392 as found in the Code of 1886.

§2392. *Inquisition; proceedings*—Upon the petition of any of the relatives or friends of any person alleged to be of unsound mind, setting forth the facts and name, sex, age and residence of such person, accompanied by an affidavit that the petitioner believes the facts therein stated to be true, the *court* of probate of the county in which such person alleged to be of unsound mind resides, must appoint a day, not more than ten days from the presentment of such petition, for the hearing thereof." (Italics ours.)

However, it is submitted, that upon construction of the domestic statutes as to the organization of the court, the summoning of the jury and the like, the decision of the domestic forum will not be inquired into by this court. (See authorities on page 5 of this brief.)

The origin of the proceeding *de lunatico inquirendo*, is at this day uncertain. It is of so great antiquity that as is stated by Mr. Pope, the question is one "more suitable to a book of antiquities than to a treatise on practical law." The foundation of the authority of the chancellor to issue the commission for the inquisition, may or may not have been the statute 17 Edw. II c c., 9, 10, but this statute is usually considered to have been merely declaratory of the common law.

As to the history of the prerogative we quote from Mr. Pope's Treatise on Lunacy as follows:

"Though the jurisdiction in lunacy as at present exercised, is almost entirely the creature of statute, it is in its origin due to the delegation by the crown of the interest which it takes by virtue of its prerogative in the estates of lunatics duly found to be so, and of the trusts to which that interest is subject. This prerogative, whatever its date—and though Staundforde places it in Edward I's reign, it was probably earlier—was definitely stated in the Statute of Prerogatives of 17 Edw. 2, the ninth chapter of which relates to idiots, the 10th to lunatics. * * *

In the beginning, the management of the lands of idiots and lunatics under the protection of the crown, was with the Exchequer. As the relation of the crown became that of a trustee, it passed into the hands of the lord chancellor." P. 25.

Mr. Justice Stone, in the cited case of Whetstone vs. Whetstone, 75 Ala., 498, was dealing with the question whether certain volunteers who had sued as next friends of a weak minded person were authorized to institute such suit, and whether they could sue in equity, the person in whose behalf they sued never having been found to be *non compos* by inquisition. Therefore, he had not under consideration, whether the prerogative in the state as successor to the King, to make inquisition into the citizen's sanity still existed, as it did prior to and under the statute 17 Edw. II c. 10, but dealt merely with the question whether that statute, treated as common law, gave to the American chancery *court* merely as successor to the court of the same name in England, the same powers as were held by the *chancellor* in England in regard to lunatics; and he in effect declared, that because the chancellor here had no political powers like those of the keeper of the great seal there, therefore as chancellor merely, he did not bring into his court a general superintendence of lunatics; the court saying on page 499 "the English statute 17 Edw. II does not of itself constitute idiots and lunatics wards of the chancery court, as infants are. * * * * Such process is issued to the keeper of the great seal and not to the *court* of chancery. * * * * It is a personal confidence reposed in the lord chancellor, the keeper of the great seal, and not in the court of chancery."

As to the point first made by the dissenting opinion of Mr. Justice Head on the first appeal to the Alabama Supreme Court, and which was adopted by counsel for plaintiff in error, that the petition in lunacy neglected to state jurisdictional facts; assuming that this court will review the ruling of the state court on this question of interpretation of the domestic law, which it doubtless will not (*supra p. 5*), we respectfully refer to brief filed by us on the last appeal to the Alabama Supreme Court, copies of which are appended to this brief, and which contains a full answer to the contention. We shall attempt to obtain and append, also, copies of brief filed on the first appeal.

Respectfully submitted by

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H. Pillans